SUPREME COURT, U. S.

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-959

CHARLES FRIEND,
Petitioner,

vs.

IRWIN R. LIPPMAN, THOMAS A. WADDELL, and THOMAS D. O'MALLEY, JR., Individually, and as INSURANCE COMMISSIONER and TREASURER of Florida, and ROYAL INDEMNITY COMPANY,
a foreign corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

ROBERT B. KANE
Post Office Box 124
Tallahassee, Florida 32302

BRIAN T. HAYES
Post Office Box 1385
Tallahassee, Florida 32302
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statement of Case and Facts 3

The Questions Are Substantial 6

Appendix:

1. Opinion of District Court of Appeal of Florida, First District 9
2. Order of Leon County Circuit Court (March 13, 1972) Dismissing Complaint 11
3. Motion for Rehearing, Clarification and Leave to Amend 13
4. Amended Complaint 16
5. Order of Circuit Court (April 12, 1972) Denying Leave to Amend 26

Citations

Cases

Board of Regents v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 ..... 6, 8

Perry v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2693, 33 L.Ed. 2d 570 ..... 6, 8

Pickering v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 7

Constitution and Statutes

Constitution of the United States—

First Amendment 3

Fourteenth Amendment 3

28 U.S.C. Sec. 1257 (3) 2

Sec. 110.051, Florida Statutes 7

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

CHARLES FRIEND,
Petitioner,

vs.

IRWIN R. LIPPMAN, THOMAS A. WADDELL, and THOMAS D. O'MALLEY, JR., Individually, and as INSURANCE COMMISSIONER and TREASURER of Florida, and ROYAL INDEMNITY COMPANY,
a foreign corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITION FOR WRIT OF CERTIORARI

Petitioner, CHARLES FRIEND, respectfully petitions this Honorable Court, pursuant to the Rules of this Court, for Writ of Certiorari to review a Decision of the District Court of Appeal of Florida, First District, and would show the following:

OPINION BELOW

Said decision is reported 277 So.2d 318. A copy thereof is attached as Appendix No. 1.

JURISDICTION

Jurisdiction of this Court is invoked to correct errors in said decision by which federal constitutional questions have been decided in a manner which is probably not in accord with applicable decisions of this Court. Said decision was:

(i) Dated and entered on April 24, 1973, at the conclusion of appellate proceedings, including oral argument in that Court;

(ii) Said opinion was finally "rendered" by denial of petition for rehearing in said Court on May 25, 1973 (not separately reported).

Said opinion was affirmed by the Supreme Court of Florida by denial of petition for certiorari on September 28, 1973 (283 So.2d 561). No extensions of time have been requested.

(iii) This Court has jurisdiction to consider this petition by virtue of Statute, 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

(i) The principal question presented is whether a state official (or agency) may require a state employee to perform unlawful acts concerning his employment, or whether the State may require an employee to refrain from exercising his constitutional rights of freedom of

speech, freedom to follow his profession, or others, on penalty of losing his state employment, that is by being involuntarily terminated or fired.

(ii) Liability of the official's bonding company depends in part upon the determination of the principal question, and the bonding company is therefore a party.

(iii) Also in question is the legality of the courts of Florida making a finding of fact: "that petitioner was exempt from the protection of the State Career Service Act (Chapter 110, Florida Statutes)—when such finding was necessarily dependent on disputed facts—all without trial by jury, or stipulation, or any evidentiary hearing whatever.

Said decision violates the First Amendment of the Constitution of the United States which provides in part:

> "Congress shall make no law . . . abridging the freedom of speech, . . ."

Said decision violates the Fourteenth Amendment of the Constitution of the United States which provides in part as follows:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." . . .

STATEMENT OF CASE AND FACTS

There is no dispute concerning the facts of this case. Plaintiff's complaint filed in the Circuit Court for Leon County, Florida, was dismissed on March 13, 1972, for fail-

ure to state a cause of action. (See Appendix No. 2.) Plaintiff moved to amend (Appendix No. 3) and tendered (filed) his amended complaint. (Appendix No. 4) The Circuit Court's order of April 12, 1972, denied plaintiff leave to amend as to the parties defendant, THOMAS D. O'MALLEY (the State Treasurer and Insurance Commissioner) and his surety ROYAL INDEMNITY COMPANY, after finding that the Amended Complaint had ". . . the same infirmities as the previous complaint. . ." (Appendix No. 5) Said order was affirmed by the District Court of Appeal of Florida, First District. It is the final decision of said District Court of Appeal which is here sought to be reviewed.

The complaint and the amended complaint contained, therefore, the admitted facts of this case, in substance, as follows:

1. Petitioner was a state employee. He also was and is a member of the Florida Bar. He was the Director of the Division of Rehabilitation and Liquidation of the Florida Insurance Department from early in 1970 until his termination in January 1971.

2. The year 1970 was an election year in Florida. The respondent, THOMAS D. O'MALLEY, ran for the office of State Treasurer and Insurance Commissioner. He was successful in the party primary election in September, 1970, and was elected to such office on November 3, 1970. He was inaugurated on January 5th, 1971.

3. Petitioner was fired on January 18th, 1971, by the respondent, THOMAS D. O'MALLEY (hereinafter referred to as O'MALLEY) because of the following:

A. Petitioner's refusal to pay money to a political benefactor of O'MALLEY'S, which monies were trust funds in the custody of the State and under the supervision

and control of the Leon County Circuit Court, and which court had indicated disapproval of such disbursement;

B. Because of his refusal to attempt to justify said disbursement to the presiding judge;

C. Because petitioner refused to change and falsify official records of the State under his control;

D. Because petitioner declined to penalize a subordinate employee for his refusal to work in a political campaign during the summer of 1970.

4. Petitioner was given no statement of charges, no hearing, and no opportunity for vindication of his position.

For clarity it should be pointed out that the complaint and amended complaint involved two other employees of O'MALLEY'S, to wit: LIPPMAN and WADDELL: however, the trial court's action treated the defendants differently by dismissing the complaint with prejudice as to O'MALLEY and his surety, and permitting amendment as to the other defendants. The Florida Rules of Civil Procedure (like the Federal Rules) make such judicial action, as to O'MALLEY, a final judgment. Without appeal at that time, it would have become final. The complaint against the other defendants continued in the Circuit Court while the present case dealing with O'MALLEY and his surety was appealed as aforesaid, and finally has come to this Court. References in the present Amended Complaint to other parties, who were not before the Appellate Court, are necessary for continuity and reference only. The pertinent portions of said Amended Complaint which show violation of constitutionally protected rights of petitioner by O'MALLEY are more particularly set forth in Appendix No. 4 hereto, paragraphs 6, 9, 11, 17, 18, 19, and 20.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented are substantial and urgent.

(i) The Florida Court has held that a state officer may fire a state employee arbitrarily, without hearing, because that employee refuses to give up constitutionally protected rights. It further held that said officer can *never* be sued for damages for such an act, regardless of improper or malicious motives. The impact of such a decision on local government could be profound.

The highest court of this state has perpetuated the error of the Circuit Court which found that: ". . . plaintiff served at the will of defendant, O'MALLEY, and could be discharged by him at any time without cause. His motive cannot form the basis of a tort action for damages." . . .

This Court has held to the contrary in *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2693, 33 L.Ed.2d 570, which held that the *motives* of the superior who fires the public employee are of the utmost importance in determining whether the employee's constitutionally protected rights were transgressed. *Sinderman* further held that an untenured employee, who might be terminated for no reason, or even for an imprudent reason, could not however be fired for constitutionally impermissible reasons. This Court held that entry of Summary Judgment against *Sinderman* was error and that he stated a cause of action for reinstatement and damages. *Sinderman's* companion case was *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548. It observed that summary judgments or judgments on the pleadings are seldom appropriate in such cases because their proper resolution demands careful fact finding.

Recent decisions of this Court rejecting the theory that public employees may be required to forego constitutional rights as a condition to keeping jobs, are cited and approved in *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 817.

(ii) Petitioner would further point out that the decision under review finds that petitioner was fired without charges or hearing upon the authority of a Florida Statute, Sec. 110.051 (2) (h), which purportedly exempts him from career service protection. We contend that protection of his constitutional rights does not, and cannot, depend upon any action or non-action of the Florida legislature; but further the statutory exemption mentioned depends on the existence of certain facts which have never been established. The section of the statute mentioned in the District Court's decision is as follows:

"110.051 Career Service; exemptions.

. . .

(2) EXEMPT POSITIONS.—The exempt positions which shall not be covered by this chapter shall include the following;

. . .

(h) Policy-making employees and the secretaries to each in the offices of secretary of state, attorney general, comptroller, treasurer, commissioner of education and commissioner of agriculture as exempted by each aforementioned office; provided, however, that the department shall set the salary of these positions unless otherwise fixed by law."

. . .

There was no judicial basis for finding the facts required by said statute; that said employee made policies; that

his secretary was an exempt employee; or that the treasurer had taken action to specifically exempt petitioner from operation of the law.

Such arbitrary fact finding is a gross violation of procedural due process as is pointed out in *Sinderman* and *Roth*.

Petitioner contends that either of the foregoing points is substantial. Increasing public awareness and interest in the integrity of governmental officers would seem to indicate that judicial inquiry into abuses of governmental power should be favored rather than discouraged. This petitioner requires redress certainly. Perhaps equally compelling reasons for this review are the continuing of public confidence in the judicial system, and the need of the electorate for knowledge of the operations of their local government. Without judicial process such secrets will be buried forever.

Petitioner would welcome opportunity for further written and oral argument.

Respectfully submitted,

ROBERT B. KANE
Post Office Box 124
Tallahassee, Florida 32302

BRIAN T. HAYES
Post Office Box 1385
Tallahassee, Florida 32302
Attorneys for Petitioner

APPENDIX

APPENDIX No. 1

Charles FRIEND, Appellant,

v.

Irwin R. LIPPMAN et al., Appellees.

No. R-190.

District Court of Appeal of Florida,
First District.

April 24, 1973.

Rehearing Denied May 25, 1973.

Action against Insurance Commissioner, Treasurer and foreign corporation for damages for alleged tortious dismissal of plaintiff as Director of Division of Rehabilitation and Liquidation of Department of Insurance. The Circuit Court, Leon County, Guyte P. McCord, Jr., J., dismissed amended complaint with prejudice, and plaintiff appealed. The District Court of Appeal held that plaintiff's employment was exempt from statutory career service protection provisions because nature of employment was policy-making in character.

Affirmed.

States (Key) 53

Employment as director of Division of Rehabilitation and Liquidation of Department of Insurance was exempt from statutory career service protection provisions because nature of employment was policy-making in character. F.S.A. § 110.051 (2) (h).

Robert B. Kane, Tallahassee, for appellant.

Robert L. Shevin, Atty. Gen., and Daniel S. Dearing, Asst. Atty. Gen., Benjamin H. Dickens, of Bryant, Dickens, Rumph, Franson & Miller, and J. Lewis Hall, Jr., of Hall, Hartwell & Hall, Tallahassee, for appellees.

PER CURIAM.

Appellant seeks review of an order dismissing with prejudice his amended complaint seeking damages arising out of his allegedly tortious dismissal from employment as Director of the Division of Rehabilitation and Liquidation of the Department of Insurance.

The trial court found that appellant's employment was exempted from career service protective provisions pursuant to Section 110.051(2)(h), Florida Statutes, F.S.A., because the nature of his employment was policy making in character. We agree.

In addition to the barring impact stemming from Section 110.051(2)(h), Florida Statutes, F.S.A., the appellees correctly contend that it has long been established by federal law that government officials and employees are immune from tort liability arising out of the removal of federal employees and it matters not that such employee may have been removed by their superior, maliciously or as a result of a conspiracy. The immunity from suit is absolute where the law gives the public official the right to remove the employee. The cases and the doctrine behind the rule are well summarized in 5 A.L.R. Federal 965, et seq.

Accordingly, the judgment reviewed herein is affirmed.

SPECTOR, C.J., and WIGGINTON and CARROLL, DONALD K., JJ., concur.

APPENDIX No. 2

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

Case No. 71-1649

CHARLES FRIEND,
Plaintiff,

vs.

IRWIN R. LIPPMAN, et al.,
Defendants.

Order Dismissing Complaint

THIS CAUSE came on for hearing on the motions of defendants to dismiss the complaint. Upon consideration of said motions and the arguments and memoranda of counsel, the Court now being advised in the premises finds as follows:

1. As to defendants, Thomas D. O'Malley, Jr., individually, and as Insurance Commissioner and Treasurer of Florida, and Royal Indemnity Company (defendant, O'Malley's, insurer), it appears that plaintiff's employment as Director of the Division of Rehabilitation and Liquidation of the Florida Department of Insurance was exempted from career service pursuant to Section 110.051(h), Florida Statutes, as a policy making job. (This has not been disputed by plaintiff in the arguments.) This being true, plaintiff served at the will of defendant, O'Malley, and could be discharged by him at any time without cause. His motive cannot form the basis of a tort action for damages. Likewise, if this action will not lie against defendant O'Malley, it will not lie against his surety, Royal Indemnity Company.

2. As to defendants, Irwin R. Lippman and Thomas A. Waddell, the complaint alleges conclusions of fact and

law rather than the ultimate facts relied upon to support such conclusions as a basis for his claim for relief.

In consideration thereof, it is

ORDERED AND ADJUDGED that this cause be and it is hereby dismissed with prejudice as to defendants, Thomas D. O'Malley, Jr., individually, and as Insurance Commissioner and Treasurer of Florida, and Royal Indemnity Company. It is further

ORDERED that this cause be and it is hereby dismissed as to defendants, Irwin R. Lippman and Thomas A. Waddel, with leave to plaintiff to amend.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 13th day of March, A. D., 1972.

/s/ Guyte P. McCord, Jr.
Circuit Judge

Copies furnished to:

Honorable Robert B. Kane
604 Midyette-Moor Building
Tallahassee, Florida 32301

Honorable Ben Dickens
700 Tallahassee Bank Building
Tallahassee, Florida 32301

Honorable J. Lewis Hall, Jr.
Post Office Drawer 840
Tallahassee, Florida 32302

Honorable Herbert T. Schwartz
Deputy Attorney General
Capitol Building
Tallahassee, Florida

Mr. John Marks
Legal Intern
Capitol Building
Tallahassee, Florida

APPENDIX No. 3

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

Case No. 71-1649

CHARLES FRIEND,
Plaintiff,

vs.

IRWIN R. LIPPMAN, et al.,
Defendants.

Motion for Rehearing, for Clarification, and for Leave to Amend

Plaintiff comes now and would pray for rehearing of the Motions to Dismiss and the Court's Order of March 13, 1972, dismissing the Complaint. Plaintiff would further move for leave to file his Amended Complaint and would show the Court as follows:

1. The Court's Order of March 13, 1972, granted leave to amend the Complaint or portions thereof which attempt to state a cause of action against the defendants LIPPMAN and WADDELL. The proposed Amended Complaint attached hereto does so amend concerning said defendants.

2. The said Order dismisses the Complaint or the allegations thereof which relate to the defendants O'MALLEY in his individual and official capacities, and ROYAL INDEMNITY COMPANY. The proposed Amended Complaint filed herewith seeks to amend concerning these defendants also.

3. The propriety, fairness and lawful precedent for permitting such amendment are urged upon the following grounds:

a). Leave to amend should be given freely because the plaintiff is in a position to materially enlarge on the allegations in the complaint and to state a cause of action against such defendants.

b). Doubts should be resolved in favor or allowing amendments or amended complaints unless and until it appears that the privilege to amend will be abused.

c). There is no suggestion or inference in the record that such privilege will be or has been abused by the plaintiff.

d). The filing of the proposed amended complaint will not change or introduce new issues or materially, if at all, vary the grounds for relief, and will not delay this action by requiring a continuance.

e). The filing of the proposed amended complaint will promote a decision on the merits, rather than on technicalities, and will therefore, further the administration of justice.

f). Plaintiff herein has studiously attempted to avoid unnecessary accusations or factual recitals so that the reputations of the parties and the confidence of the public in their government may be protected from needless suspicions. His good faith efforts to litigate with a becoming respect for his adversaries' convenience should not be used to destroy his cause of action.

WHEREFORE, plaintiff prays that the Court will grant rehearing, that it will receive and file the proposed Amended Complaint and require all defendants to respond on an early day

/s/ Robert B. Kane
Robert B. Kane
604 Midyette-Moor Building
Tallahassee, Florida
Attorney for Plaintiff

I CERTIFY that a copy of the foregoing Motion was mailed on this 22nd day of March, 1972, to the following:

Benjamin H. Dickens, Esq.
700 Tallahassee Bank Building
Tallahassee, Florida

J. Lewis Hall, Jr., Esq.
Post Office Drawer 840
Tallahassee, Florida

Herbert T. Schwartz, Esq.
Deputy Attorney General
The Capitol
Tallahassee, Florida

/s/ Robert B. Kane
Robert B. Kane

APPENDIX No. 4

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

Case No. 71-1649

CHARLES FRIEND,
Plaintiff,

vs.

IRWIN R. LIPPMAN, THOMAS A. WADDELL and THOMAS D. O'MALLEY, JR., individually and as Insurance Commissioner and Treasurer of Florida, and ROYAL INDEMNITY COMPANY,
a foreign corporation,
Defendants.

Amended Complaint

The plaintiff sues the defendants and alleges:

COUNT ONE

1. The plaintiff and the defendants, LIPPMAN, WADDELL and O'MALLEY, are residents of Leon County, Florida. The defendant, ROYAL INDEMNITY COMPANY, is a New York Corporation doing business in Florida.

2. During 1970 and January, 1971, the plaintiff was Director of the Division of Rehabilitation and Liquidation of the Florida Department of Insurance.

3. From January, 1970, until the filing of this suit, the defendant LIPPMAN was Director of the Division of Personnel of the Florida Insurance Department.

4. From January, 1970, until the filing of this suit, the defendant WADDELL was General Counsel of the Florida Department of Insurance and, as such, was the

plaintiff's immediate superior. The defendant WADDELL was also the plaintiff's immediate superior during the last eight months (May through December) of 1969.

5. On November 3, 1970, the defendant O'MALLEY was elected Insurance Commissioner and Treasurer of Florida, and on January 5, 1971, he was inaugurated as such, and he has continued as such to date.

6. Between January 1, 1970, and November 23, 1971, the defendant LIPPMAN, in his official capacity as Director of the Division of Personnel, without just cause

(a) threatened the plaintiff with the loss of the plaintiff's job

(1) because the plaintiff refused to carry out or to agree to carry out the defendant LIPPMAN's orders, instructions and requests that the plaintiff improperly alter and falsify the monthly report of attendance and leave of the Rehabilitation and Liquidation Division for the month of October, 1970, which alteration and falsification by the plaintiff, the defendant LIPPMAN knew or had reason to believe would have been in violation of Section 22A-8.04 of the Personnel Rules and Regulations of the state of Florida;

(2) because the plaintiff refused to carry out or to agree to carry out the defendant LIPPMAN's orders, instructions and requests that the plaintiff grant administrative leave with pay to a state employee in the Rehabilitation and Liquidation Division for an unauthorized purpose which the defendant LIPPMAN knew or had reason to believe was an unauthorized purpose, which action by the plaintiff the defendant LIPPMAN knew or had reason to believe would have been in violation of Sec-

tions 22A-8.03 and 22A-8.13 of the Personnel Rules and Regulations of the state of Florida;

(3) because the plaintiff refused to agree to the urging of the defendant LIPPMAN that a state employee in the Rehabilitation and Liquidation Division be penalized because of that employee's refusal, or supposed refusal, despite being threatened, to work in a political campaign during the summer of 1970, which penalty the defendant LIPPMAN knew or had reason to believe would have been in violation of Section 110.092(1), Florida Statutes, and which threats the defendant LIPPMAN knew or had reason to believe were in violation of Sections 110.092(5) and 104.31(1) (b), Florida Statutes;

(b) threatened the plaintiff by advising the plaintiff that he (the defendant LIPPMAN) would report the first two refusals above (those designated (a) (1) and (a)(2) above having to do with the Personnel Rules and Regulations) to the Insurance Commissioner and to the defendant WADDELL, the plaintiff's superior;

(c) so advised the defendant WADDELL;

(d) advised the defendant O'MALLEY in substance that the plaintiff was uncooperative, or difficult to deal with, and/or made other unfair and uncomplimentary statements concerning plaintiff to the defendant O'MALLEY, thereby intending to bring about plaintiff's discredit and discharge and thereby causing the defendant O'MALLEY to discharge the plaintiff from his employment.

7. As a result of such acts of the defendant LIPPMAN, the plaintiff has lost and will lose earnings, retirement benefits and sick and annual leave benefits, and was damaged in his professional reputation.

COUNT TWO

8. The plaintiff realleges the allegations in paragraphs 1 through 5 of Count One.

9. Between January 1, 1970, and November 23, 1971, the defendant WADDELL, in his official capacity as General Counsel, without just cause

(a) threatened the plaintiff with the loss of the plaintiff's job:

(1) because of the plaintiff's refusals made to the defendant LIPPMAN in connection with the Personnel Rules and Regulations, as set out in Paragraph 6 (a) (1) of this Amended Complaint;

(2) because of the plaintiff's refusals made to the defendant LIPPMAN in connection with the Personnel Rules and Regulations, as set out in Paragraph 6 (a) (2) of this Amended Complaint;

(3) because the plaintiff refused to do for the defendant WADDELL precisely what the plaintiff had refused to do for the defendant LIPPMAN contrary to the Personnel Rules and Regulations, as set out in Paragraphs 6 (a)(1) and 6 (a)(2) of this Amended Complaint, except that with respect to the defendant WADDELL the words "month of October" in Paragraph 6 (a) (1) should be "months of October, November and December", and the words "a state employee" in Paragraph 6 (a)(2) should be "two state employees", the defendant WADDELL having substantially the same knowledge as is attributed to the defendant LIPPMAN, and on each of the same occasions.

(4) because the plaintiff refused to carry out the defendant WADDELL's orders to employ a political

benefactor of the defendant O'MALLEY by placing such person on a payroll fed by and consisting of the trust funds and other assets of numerous insolvent insurance companies in receivership in Florida, knowing that such trust funds and other assets were in the custody of the circuit court of Leon County, knowing or having reason to believe that such employment could not be fairly justified, and knowing and/or having reason to believe that such employment would be in violation of orders of the circuit court of Leon County entered in such receiverships, and in violation of Section 631.141(6), Florida Statutes;

(b) advised the defendant O'MALLEY of one or more of such refusals thereby intending to adversely affect plaintiff's employment relationships, and intending to bring about his discharge from employment, and causing the defendant O'MALLEY to discharge the plaintiff from his employment, thereby causing those injuries alleged in Paragraph 7.

COUNT THREE

10. The plaintiff realleges the allegations in Paragraphs 1 through 5 of Count One.

11. (a) As a result of some or all of the acts of the defendants LIPPMAN and WADDELL, set out in Counts One and Two, and additional similar acts of such defendants, the defendant O'MALLEY, on January 18, 1971, on an unreasonably arbitrary basis and without just cause, discharged the plaintiff, from his employment, to become effective on January 31, 1971, without furnishing the plaintiff with an opportunity to be heard or to present evidence, or to confront his accusors, to which the plaintiff was entitled, there-

by depriving the plaintiff of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and the Florida Constitution, Article I, Section 9.

(b) This deprivation of due process rights was carried out by the defendant O'MALLEY because the plaintiff asserted certain constitutional rights in refusing orders of the defendant O'MALLEY that the plaintiff illegally employ and pay, out of the trust funds of insolvent insurance companies, the political benefactor of the defendant O'MALLEY, as alleged in Paragraph 9 (a) (4) of this Amended Complaint.

(c) Examples of such constitutional rights claimed by plaintiff and alleged to have been violated by defendant O'MALLEY and the other individual defendants are:

(1) The right of freedom of speech, i.e., the right, if not the duty, to express his (plaintiff's) opinion to the court in whose custody the trust funds of the insolvent insurance companies reposed that such proposed employment and salary payments could not be fairly justified in the circumstances.

(2) The right not to be punished or suffer retaliation because of plaintiff's exercise of constitutional rights.

(3) The right to personal liberty, in that the loss of one's job lessens the employee's freedom.

(4) The right to pursue employment without arbitrary vilification, threats or discrimination.

(5) The property right to hold specific employment.

(6) The liberty to follow one's chosen profession free from unreasonable governmental or other interference.

(7) The opportunity for public employment.

(8) The right to practice one's profession effectively.

(d) The said discharge of plaintiff by the defendant O'MALLEY was not necessitated by any exigency of the public well-being, and was unjustified.

12. The plaintiff alleges against the defendant O'MALLEY the same allegations asserted against the defendant LIPPMAN in Paragraph 7 of Count One.

COUNT FOUR

13. The plaintiff realleges the allegations contained in Paragraphs 1 through 5 of Count One.

14. Between January 1, 1970, and November 23, 1971, inclusive, the defendants LIPPMAN and WADDELL intentionally conspired with each other to wrongfully procure the plaintiff's discharge from his employment, and in furtherance of that conspiracy performed those acts alleged in Paragraphs 6 and 9, thereby causing the defendant O'MALLEY to discharge the plaintiff from his employment.

15. As a result of such acts of the defendants LIPPMAN and WADDELL in combination, the plaintiff has been damaged as alleged in Paragraph 7 above.

COUNT FIVE

16. Plaintiff realleges the allegations contained in Paragraphs 1 through 5 of Count One.

17. Between January 1, 1970, and November 23, 1971, the defendants LIPPMAN and WADDELL agreed and conspired and planned to expend certain public funds or trust funds, contrary to court orders and contrary to law as alleged in Paragraphs 9 (a)(4) and they each performed acts in furtherance of said plan. The defendant O'MALLEY entered into said conspiracy on or after September 8, 1970, and thereafter performed acts in furtherance of said plan.

18. Plaintiff was directed to participate in said conspiracy by said defendants, but he refused.

19. Because of plaintiff's refusal to participate in said conspiracy the defendants LIPPMAN and WADDELL took actions as alleged in Paragraphs 6 and 9 aforesaid.

20. Because of plaintiff's refusal to participate in said conspiracy, the defendant O'MALLEY took actions as alleged in Paragraph 11 of Count Three.

21. The defendants LIPPMAN, WADDELL and O'MALLEY conspired to damage the plaintiff in his employment and took the aforesaid acts in furtherance of said conspiracy.

22. As a result of said conspiracy, and as a result of the unlawful and tortious acts, of the said three conspirators, the plaintiff has been damaged as alleged in Paragraph 7 of Count One.

COUNT SIX

23. The plaintiff realleges the allegations of Paragraphs 1 through 5 of Count One.

24. On or about December 1, 1970, the defendant O'MALLEY bound himself in the penal sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) to the

Governor of Florida, the condition of said bond being that he shall faithfully perform the duties of his said office.

25. The defendant, ROYAL INDEMNITY COMPANY (hereafter ROYAL), a foreign corporation, bound itself in like amount as surety upon the aforesaid obligation of the defendant O'MALLEY. A true copy of the written obligation or Bond, executed by the defendants O'MALLEY and ROYAL is attached to the Complaint and marked for identification as Plaintiff's Exhibit I.

26. Said Bond has remained in force and effect at all times since its execution as aforesaid through the filing of the Complaint herein.

27. Plaintiff alleges all allegations of Paragraphs 6, 7 and 9, as to defendants LIPPMAN and WADDELL.

28. Plaintiff realleges all allegations of Paragraphs 11 and 12 as to the defendant O'MALLEY.

29. The acts described in Paragraphs 6, 9, 11, 14, 17, 18, 19, 20, 21 and 22 were done in the official capacity of the said individual defendants, and/or they were done under the color of office of the said defendants, and/or with the authority of the said offices of said defendants.

30. The acts described in Paragraphs 6, 9, 11, 14, 17, 18, 19, 20, 21 and 22 were unfaithful to the office of said defendants. The said acts constitute a breach of public trust by said defendants. Said acts constitute a breach of the condition of said Bond by each of the said individual defendants.

31. As a result of said acts plaintiff has been damaged as alleged in Paragraph 7 of Count One.

32. As a result of the aforesaid unlawful and tortious acts of each of the defendants, the surety, ROYAL, has

become liable and obligated to plaintiff for his damages as aforesaid.

33. All conditions precedent to bringing suit upon said Bond have been performed by plaintiff.

WHEREFORE, the plaintiff demands judgment against the defendants, and each of them, for compensatory damages in excess of the minimum jurisdictional amount of this Court, and punitive damages in excess of the minimum jurisdictional amount of this Court, and demands trial by jury

/s/ Robert B. Kane
Robert B. Kane
Attorney for Plaintiff
604 Midyette-Moor Building
Tallahassee, Florida 32301

APPENDIX No. 5

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

Case No. 71-1649

CHARLES FRIEND,
Plaintiff,

vs.

IRWIN R. LIPPMAN, et al.,
Defendants.

Order

THIS CAUSE came on for hearing on plaintiff's motion entitled "Motion for Rehearing, for Clarification, and for Leave to Amend," directed to order of March 13, 1972, dismissing the complaint with prejudice as to defendants, Thomas D. O'Malley, Jr., individually, and as Insurance Commissioner and Treasurer of Florida, and Royal Indemnity Company, and dismissing the complaint with leave to amend as to defendants, Irwin R. Lippman and Thomas A. Waddell. It is questionable that motion for rehearing will lie under Rule of Civil Procedure 1.530 to reconsider an order dismissing a complaint, but the Court has considered same and upon such consideration of the arguments of counsel finds as follows:

It would serve no useful purpose to allow plaintiff to amend as to defendants, O'Malley and Royal Indemnity Company. The Court has found and reaffirms:

> ". . ., plaintiff served at the will of defendant, O'Malley, and could be discharged by him at any time without cause. His motive cannot form the basis of a tort action for damages. Likewise, if this action will not

lie against defendant, O'Malley, it will not lie against his surety, Royal Indemnity Company."

Plaintiff, with his motion, has tendered an amended complaint in which he attempts to again state a cause of action against the defendants and attempts to bring the alleged acts of defendants, Lippman and Waddell, within the obligations of the indemnity bond of Royal Indemnity Company as surety and Thomas D. O'Malley as the Treasurer and Insurance Commissioner of the State of Florida. In his motion here before the Court, plaintiff states "the filing of the proposed amended complaint will not change or introduce new issues or materially, if at all, vary the grounds for relief, and will not delay this action by requiring a continuance." The proposed amended complaint does not state a cause of action against defendant, O'Malley, and his surety. As to said defendants, it has the same infirmities as the previous complaint and therefore it would serve no useful purpose to allow it to be filed.

The obligation of defendant, O'Malley's, surety bond is as follows:

> "Now, therefore, if the said Thomas D. O'Malley shall faithfully perform the duties of his said office, as provided by law, then this obligation to be void, else to be and remain in full force and virtue."

The alleged conspiracy between the officers or employees of the State Treasurer and Insurance Commissioner to wrongfully cause another employee to be discharged does not constitute an act or acts for which the State Treasurer and Insurance Commissioner (the principal on the bond) is liable. The surety's liability on the bond is coextensive with that of the principal and in the absence of liability of the principal, there is no liability of the surety.

Defendant, O'Malley's, discharge of an employee, which under the law he could do at will and without cause, is not a violation of any constitutional right of plaintiff.

In consideration thereof it is

ORDERED AND ADJUDGED that the motion of plaintiff is denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 12th day of April, A.D., 1972.

/s/ Guyte P. McCord, Jr.
Circuit Judge